

1 HONORABLE RICHARD A. JONES
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 LAWRENCE SHERMAN,
12 Plaintiff,

13 v.
14 JOHN POTTER, in his capacity as
15 Postmaster General of the United States,
16 Defendant.

CASE NO. C08-1533RAJ
ORDER

17 This court issues this order to resolve issues remaining from Defendant's summary
18 judgment motion, which the court initially granted on March 14. Dkt. # 66. The court
19 vacated that order when it decided to accept Plaintiff's late-filed evidence, and granted
20 his motion for reconsideration on June 28. Dkt. # 81. Defendant then moved for
21 reconsideration, claiming among other things that the court should have addressed two
22 peripheral issues that it raised in its motion for summary judgment, but that the court had
23 no need to address in light of its original decision to grant that motion. In an August 4
order, the court stated that it would resolve those issues in a separate order.

24 As the court has recounted in numerous orders, Plaintiff Lawrence Sherman was
25 once an employee of the United States Postal Service, an agency that Defendant John
26 Potter heads. For simplicity, the court refers to Defendant as "USPS." Rather than
27 review all of the twists and turns in Mr. Sherman's convoluted employment history, the
28 ORDER – 1

1 court notes that USPS initially fired him in November 2006 for allegedly misusing mail
2 to support a claim that he had been the subject of unlawful discrimination. Mr. Sherman
3 soon thereafter filed an EEOC complaint contending that he was fired in retaliation for
4 raising his discrimination claims.

5 USPS's summary judgment motion raised several issues that were not dispositive
6 of any claim. It is permitted to do so, because a court can grant summary judgment on
7 any part of a claim or defense. Fed. R. Civ. P. 56(a). The issues USPS raised fall into
8 two categories: whether some of the acts that Mr. Sherman contends are retaliatory are
9 beyond the scope of this lawsuit, and second, whether the court should limit aspects of
10 the damages Mr. Sherman seeks.

11 As to the first category, USPS contends that two of its acts are beyond the scope of
12 Mr. Sherman's retaliation claim: reporting to Washington's Employment Security
13 Department ("ESD") that it terminated Mr. Sherman for misconduct, and posting a
14 security warning bearing Mr. Sherman's picture at the facility at which Mr. Sherman
15 once worked. Both acts occurred shortly after USPS terminated Mr. Sherman.
16 According to Mr. Sherman, USPS reported his alleged misconduct to the ESD in early
17 2007 in an effort to ensure that Mr. Sherman did not receive unemployment benefits. At
18 the time, USPS had terminated Mr. Sherman's employment, although it ultimately
19 reversed that decision in mid-2007 when Mr. Sherman prevailed in a union grievance.

20 USPS insists that Mr. Sherman's retaliation claim is limited to the conduct he
21 described in the EEOC complaint that he filed shortly after USPS terminated him in
22 November 2006. The court has addressed this issue once before, in a December 2009
23 order denying USPS's motion to dismiss. Dkt. # 29. There, the court rejected USPS's
24 narrow view of the scope of a retaliation claim. The court cited *Lyons v. England*, 307
25 F.3d 1092, 1104 (9th Cir. 2002), where the Ninth Circuit explained that unlawful acts
26 "not included in an EEOC charge" are nonetheless within the scope of the lawsuit so long

1 as they are “like or reasonably related to the allegations contained in the EEOC charge.”
2 The court noted that *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113
3 (2002), places limitations on which acts occurring prior to an EEOC charge can fall
4 within the scope of that charge. Those limitations do not, however, apply to acts like the
5 ones Mr. Sherman hopes to raise, which occurred *after* he filed his EEOC charge.

6 USPS’s decision to post what amounts to a banishment order with Mr. Sherman’s
7 photo at its facility is indistinguishable from its decision to terminate him. While some
8 employers merely end a worker’s employment and move on, USPS allegedly posted a
9 notice at its facility falsely declaring to his former co-workers and any member of the
10 public that Mr. Sherman was a security threat. A factfinder may consider whether this
11 aspect of USPS’s termination decision caused additional damages to Mr. Sherman.

12 USPS’s decision to accuse Mr. Sherman of misconduct before the ESD is also
13 closely related to its termination decision. A factfinder could conclude that USPS was
14 not content merely to terminate Mr. Sherman, but instead pursued a scorched-earth
15 campaign to inflict as much damage as it could to Mr. Sherman’s economic livelihood.
16 This is not the only conclusion a factfinder might reach, but the court cannot foreclose the
17 possibility on summary judgment.

18 The acts that Mr. Sherman points to are closely related to USPS’s termination
19 decision, and a factfinder could conclude that they would deter a reasonable employee
20 from engaging in the protected activity of making an EEOC charge. No more is required.
21 See *Lyons*, 307 F.3d at 1104 (noting that acts are within scope of EEOC charge if they
22 could reasonably be expected to fall within the scope of an EEOC investigation into the
23 charge); see *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000) (explaining that
24 adverse employment action for purposes of a retaliation claim is any act that “is
25 reasonably likely to deter employees from engaging in protected activity”).

1 USPS also hopes to limit Mr. Sherman's damage claims. It contends that because
2 Mr. Sherman's termination lasted only from December 2006 to March 2007, and he
3 received backpay after USPS reinstated him, his damages should be limited. A factfinder
4 must certainly consider the duration of Mr. Sherman's "temporary" termination, and it
5 must certainly consider any backpay he received. This does not mean, however, that Mr.
6 Sherman cannot look outside this window in time to support his damage claims. He may
7 not be able to support a claim for lost wages, but he may certainly attempt to prove that
8 he suffered emotional damages or other damages arising from his termination but
9 extending beyond that time window. Similarly, a factfinder will no doubt consider Mr.
10 Sherman's attempt to voluntarily leave his employment in June 2008 for medical reasons
11 to be relevant to any claim for lost wages or benefits. The court finds no reason,
12 however, to grant summary judgment somehow limiting a factfinder's consideration of
13 these issues. The factfinder will follow the law in assessing damages. USPS is entitled
14 to no more.

15 The court declines to make any decision regarding the effect of USPS's second
16 decision to terminate Mr. Sherman in 2009. This time, USPS's stated reason was the
17 ESD's finding that Mr. Sherman had improperly collected unemployment benefits even
18 after he began receiving pay from USPS after his reinstatement. Since USPS filed its
19 motion for summary judgment, Mr. Sherman was apparently convicted in Pierce County
20 Superior Court of first-degree theft for that conduct. If Mr. Sherman intends to claim any
21 damages that he incurred after January 2009, he shall inform USPS. If Mr. Sherman does
22 so, USPS may, in motions in limine, reassert its contention that the court should bar any
23 claim to damages arising after January 2009. This will ensure that the both parties have a
24 chance to address recent developments relevant to this issue.

25 Finally, USPS asserts that it is immune as a matter of law from Title VII punitive
26 damage claims. Every federal court of appeals to consider the issue has adopted USPS's
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1 position. *E.g., Baker v. Runyon*, 114 F.3d 668, 671-72 (7th Cir. 1997); *Robinson v.*
2 *Runyon*, 149 F.3d 507, 517 (6th Cir. 1998). So far as the court is aware, the Ninth Circuit
3 has not considered the issue. So far as the court is aware, however, every district court
4 within the Ninth Circuit that has considered the issue has found USPS immune from Title
5 VII punitive damages. *E.g., Cleveland v. Runyon*, 972 F. Supp. 1326, 1330 (D. Nev.
6 1997); *Golez v. Potter*, No. 09cv965 BTM(WMC), 2010 U.S. Dist. LEXIS 69195, at *7
7 (S.D. Cal. Jul. 12, 2010). Mr. Sherman makes no effort to argue that USPS can be liable
8 for punitive damages. He instead concedes that “USPS is likely correct that punitive
9 damages will not be available” Pltf.’s Opp’n (Dkt. # 24) at 24. The court concludes
10 that Mr. Sherman has waived any punitive damages claim.

11 DATED this 31st day of August, 2011.

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15 The Honorable Richard A. Jones
16 United States District Court Judge
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